

## How Landlords Can Prohibit Smoking in Rental Housing

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Although Californians have extensive protections from exposure to secondhand tobacco smoke where they work, eat, and play, some are still exposed to secondhand smoke where they live. Tenants in multi-family housing are at particular risk for being exposed to secondhand smoke. Landlords and property managers can protect tenants from exposure to secondhand smoke by prohibiting smoking in common areas of buildings and in individual rental units.

This fact sheet describes how a landlord can make both common areas and individual units nonsmoking, and outlines the steps a landlord would follow to implement these changes. The information in this fact sheet does not apply to rental housing governed by a local rent control ordinance.<sup>1</sup> In addition, this fact sheet does not apply to a condominium complex that is seeking to adopt a no-smoking policy.<sup>2</sup> Also note that if rental housing is subsidized by a government agency, such as the U.S. Department of Housing and Urban Development (HUD), additional procedures might be required to adopt a no-smoking policy.

### **Q: Is it legal for a landlord to prohibit smoking?**

**A:** Yes, it is legal for a landlord to ban smoking in both common areas and in individual units. A ban on smoking in common areas is similar to other rules tenants typically must follow regarding the use of common areas, such as the hours for using the laundry facility or the requirement that children be accompanied by an adult when using the pool.



It is also legal for a landlord to ban smoking in individual units. Landlords have the legal right to set limits on how a tenant may use rental property—for instance, by restricting guests, noise, and pets. A “no-smoking” term is similar to a “no pets” restriction in the lease—another way for a landlord to protect his or her property.

**Important:** A landlord is not unlawfully discriminating against tenants who smoke or violating their fundamental right to privacy by banning smoking in common areas or individual units.<sup>3</sup>

### **Q: Why would a landlord want to prohibit smoking?**

**A:** In addition to the important health benefits of reducing exposure to secondhand smoke, restricting smoking can decrease the risk of accidental fires and may even reduce fire insurance premiums. Landlords also may see a significant reduction in maintenance and turnover costs. Cleaning and refurbishing a unit in which occupants have smoked can require additional time, effort, and money to repaint and to replace carpets and drapes. By prohibiting smoking in a unit, landlords can minimize or eliminate these expenses altogether.

**Q: How would a landlord restrict smoking in the common areas?**

**A:** A landlord may prohibit smoking in common areas, such as lobbies, hallways, parking lots, laundry rooms, and swimming pools, by changing the rules for those areas. In most cases, such a change does not require changing an individual tenant's lease.<sup>4</sup> Instead, a landlord should provide reasonable notice to tenants of the new no-smoking policy, usually 30 days prior to it becoming effective; describe what areas are to be no-smoking; and post signs in those areas. The landlord also may designate a specific area where smoking would be allowed. Note that state law may already prohibit smoking in indoor common areas such as lobbies, hallways, laundry rooms, and stairwells, if the facility has employees, such as maintenance workers, property managers, or others who work on site.<sup>5</sup>

**Q: How would a landlord prohibit smoking in an individual unit?**

**A:** A landlord would amend the lease with the tenant to add a no-smoking provision.<sup>6</sup> The process the landlord uses depends on the type of lease involved.

**New Lease:**

The easiest time for a landlord to establish a no-smoking policy is when a new lease is created, either when a new tenant moves in or when an expired lease is replaced. Once the landlord and the tenant sign the new agreement, the smoking restriction becomes a requirement like any other provision in the lease. Note that such a provision does not prevent a tenant who smokes from renting the unit; instead, it prohibits smoking by anyone in the unit—whether a tenant or a guest.

**Existing Lease—with consent of the tenant:**

If a current tenant and landlord both agree to change an existing lease to include a no-smoking provision, the landlord should either:

- create a new lease that includes the no-smoking provision; or
- add an amendment to the existing lease specifying the no-smoking provision. A lease amendment must refer to the agreement that is changed and must be signed by the same two people who signed the original agreement.

**Existing Lease—without the consent of the tenant:**

If a landlord wants to include a no-smoking clause in an existing lease but the current tenant does not, the landlord may still change the lease to prohibit smoking in the unit. The process depends on the type of rental agreement:

***Month-to-month rental agreement:*** A landlord may add a smoking prohibition to a month-to-month rental agreement by giving written notice to the tenant of the new condition<sup>7</sup> and by making the no-smoking restriction effective at least 30 days after giving notice to the tenant.<sup>8</sup> A tenant who does not accept this new lease term is, in effect, ending the tenancy by refusing to renew the month-to-month rental agreement.<sup>9</sup>

***Fixed-term lease:*** When a lease is for a fixed term (typically a six- or 12-month period), the landlord cannot change the lease during that time period

without the tenant's consent. This type of lease fixes all the conditions in the lease, and the landlord cannot make any changes to the lease during that time. However, when a fixed-term lease ends, it may convert to a month-to-month agreement. If so, the landlord may then add a no-smoking provision to this new month-to-month agreement by following the same steps outlined for the month-to-month rental agreement, above. Otherwise, at the end of the fixed term, the landlord and tenant may need to create a new lease, which can include the no-smoking clause.

**Q: Can a landlord prohibit smoking on the balcony or patio?**

**A:** Yes, a landlord may restrict smoking both inside and outside the unit. A no-smoking provision in the rental agreement should clearly state whether smoking is prohibited inside the unit and in any outdoor space that only the tenant or his/her guests can use, such as the balcony or patio of that unit.

**Q: What effect does a no-smoking lease term have?**

**A:** The smoking prohibition becomes part of the lease. This new term will be like any other condition of the lease: if the tenant or the tenant's guests fail to comply with the provision, the tenant is in breach of the agreement, which could be grounds to end the tenancy.<sup>10</sup>

## Sample Lease Provisions

The website links below contain sample language for smoking restrictions in both common areas and individual units.<sup>11</sup>

[www.smokefreeapartments.org/caa\\_smoking\\_addendum.pdf](http://www.smokefreeapartments.org/caa_smoking_addendum.pdf)

[www.smokefreeapartments.org/Smokefree%20Lease%20Addendum.pdf](http://www.smokefreeapartments.org/Smokefree%20Lease%20Addendum.pdf)

[www.smokefreeapartments.org/One-Page%20Lease%20Addendum.pdf](http://www.smokefreeapartments.org/One-Page%20Lease%20Addendum.pdf)

Additional materials addressing drifting smoke in multi-family housing are available from TALC's website at <http://talc.phil.org>.

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<sup>1</sup> Such ordinances generally prohibit landlords from changing lease agreements without the tenant's consent. Contact your local rent control board for specific information regarding your rent control ordinance.

<sup>2</sup> The scope of smoking restrictions and the process to adopt such a policy for a condominium complex is very different from that in the rental housing context because of condominiums' ownership structure and covenants, conditions, and restrictions (CC&Rs). Note, however, that this fact sheet applies if a condominium owner is renting the unit to a tenant.

<sup>3</sup> For a more detailed discussion of this topic, see TALC's publication "There Is No Constitutional Right to Smoke" ([http://talc.phlaw.org/pdf\\_files/0051.pdf](http://talc.phlaw.org/pdf_files/0051.pdf)).

<sup>4</sup> Most leases specifically give the landlord the right to make future changes to the house rules, including rules for the common areas. If this is the case, then the landlord may easily change the common area rules to prohibit smoking. If the lease does *not* explicitly give the landlord power to change the house rules then the landlord should provide sufficient notice of the smoking restrictions and cite safety reasons, such as the increased risk from fire and the dangers of secondhand smoke, for instituting the new policy.

<sup>5</sup> Cal. Labor Code section 6404.5.

<sup>6</sup> The terms *lease* and *rental agreement* are legally interchangeable and are used in this manner throughout this fact sheet. In practice, a *lease* provides for a fixed term tenancy (usually six or 12 months), and a *rental agreement* is used for a month-to-month tenancy.

<sup>7</sup> A landlord must follow the notice requirements set forth in California Code of Civil Procedure section 1162, which authorizes a landlord to serve notice of a changed lease term in three ways: the landlord must attempt to give written notice to the tenant personally; if that fails, she may leave a copy with someone of suitable age and discretion at either the tenant's residence or place of business; and if that fails, the landlord may fasten a copy in a conspicuous place on the property, and mail a copy to the tenant.

<sup>8</sup> Cal. Civil Code § 827(a).

<sup>9</sup> Note that in rent control jurisdictions, changing a month-to-month rental agreement may not be possible. Also, a landlord should act cautiously in seeking to end a rental agreement with a tenant who does not want to abide by the new non-smoking term. If there is a history of disputes between the landlord and the tenant, a court may view the landlord's inclusion of the new non-smoking term as a pretext for eviction of the tenant.

<sup>10</sup> A landlord may wish to consult an attorney before enforcing the smoking prohibitions in the lease.

<sup>11</sup> TALC does not specifically endorse any of the cited provisions and is providing the sample lease provisions as examples only. Landlords should consult an attorney before adding language to their rental agreements.